

Service Date: March 23, 2001

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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| IN THE MATTER OF MONTANA POWER |) | UTILITY DIVISION |
| COMPANY, Complaint by BOZEMAN |) | |
| SCHOOL DISTRICT, et al., Regarding |) | DOCKET NO. D2000.9.140 |
| Return to Utility Service |) | |
| |) | ORDER NO. 6287a |

FINAL ORDER

Introduction

1. On September 1, 2000, the Bozeman School District, et al., (District), filed before the Public Service Commission (PSC) a "petition for declaratory order." In the petition the District requests a legal ruling on whether Montana Power Company (MPC) can lawfully refuse to allow a certain category of MPC natural gas transportation customers to return to MPC as gas sales customers (i.e., MPC full-service customers). The PSC determined that the District's petition should be treated as a complaint and, on September 22, 2000, issued a notice of complaint to MPC.

2. On October 12, 2000, MPC responded to the complaint by filing a motion to dismiss, arguing that the District has entered a contract with MPC pertaining to gas transportation, the contract governs the rights and obligations of the District regarding the service provided, the PSC does not have jurisdiction over contracts, and dismissal by the PSC is therefore appropriate. MPC points out that its contract with the District (and others) specifically provides that the District cannot return to sales service after the first year of transportation service, a time which has come and gone well prior to the District's request to return to MPC's sales service.

3. On October 16, 2000, the District filed a response to MPC's motion and also a motion for summary judgment. The District argues that it is not seeking a PSC declaration on the validity of a contract, it is seeking PSC enforcement of a stipulation entered by MPC in a

previous PSC proceeding, without which MPC could not have made a contract and with which any MPC contract must comply. In regard to summary judgment the District argues that there are no genuine issues of material fact, as a matter of law the District is entitled to return to MPC gas sales service, and summary judgment in favor of the District is therefore appropriate.

4. On November 2, 2000, the PSC issued a proposed order (*PSC Order No. 6287*) denying MPC's motion to dismiss, granting summary judgment against the District and in favor of MPC, and dismissing the District's complaint. Through the exceptions (i.e., objections) process applicable to PSC proposed orders MPC has supported the proposed order and the District has opposed it. Briefs have been filed. On February 5, 2001, the PSC held oral argument on the exceptions. In this final order the PSC affirms the result of the proposed order (i.e., dismissal of the District's complaint), but replaces the proposed order in its entirety

Discussion

MPC's Motion to Dismiss

5. The PSC affirms the proposed denial of MPC's motion to dismiss (*PSC Order No. 6287, paras. 5 and 6*). When PSC jurisdiction over a contract is challenged, § 69-3-103, MCA, which provides that the PSC does not have judicial powers, is commonly referenced. The PSC determines the provision most probably is referring to "inherent judicial powers," such as the inherent powers courts have over all claims in law and equity. *See, Art. VII, § 4, Mont. Const.* The PSC does not assert such broad judicial powers. However, the PSC exercises numerous powers, generally referred to as "quasi-judicial" powers, which are indistinguishable from powers the judiciary exercises, and does so lawfully so long as the PSC has been enabled to exercise those powers.

6. PSC powers do extend to contracts under certain circumstances. Case law establishes that contracts may be subject to state regulatory powers, and the PSC, having authority over rates and services of public utilities, may have the power to supersede or modify contracts made by public utilities to the extent that rates and services are affected. *City of Billings v. PSC, 193 Mont. 358, 370, 631 P.2d 1295, 1303 (1981)*. The PSC determines that

there is at least one situation where "rates and services are affected," within the meaning of *City of Billings*, and that is where an issue is raised regarding whether a public utility has contracted to provide services at rates, terms, or conditions other than those approved by the PSC. The PSC is "enabled," jurisdictionally and otherwise, regarding such contract matters where the PSC administers applicable statutes, such as statutes precluding a public utility from deviating from PSC-approved rates and services (*see, e.g., § 69-3-305, MCA*).

7. The District's complaint centers on the question of whether MPC is deviating, through contract or otherwise, from rates or terms and conditions approved by the PSC (through a stipulation entered by MPC in a previous PSC proceeding). Therefore, to the extent the contract relates to this question, the PSC has jurisdiction over the contract between the District and MPC. The contract would not be valid and could not dictate the outcome of the District's complaint if the contract were in violation of a PSC-approved rate or term or condition pertaining to MPC's service. MPC's motion to dismiss is denied, but denial makes little or no legal difference, as the relevant terms of the contract between the District and MPC are not in violation of any PSC-approved term or condition of MPC's gas services (discussed below).

District's Motion for Summary Judgment

8. The PSC also affirms the proposed denial of summary judgment requested by the District, the proposed grant of summary judgment in favor of MPC, and the resulting proposed dismissal of the District's complaint (*PSC Order No. 6287, paras. 7 through 10*). In regard to the District's motion for summary judgment, the category of MPC gas transportation customers denied return by MPC is comprised of customers who: (a) at one time were able to establish that they used greater than 5,000 dkt gas per year and therefore qualified for choice of competitive suppliers on MPC's system; (b) did then choose a competitive supplier, obtaining whatever benefits of choice were available at that time; and (c) now, for various reasons, can establish that they use less than 5,000 dkt gas per year. The District is within this category of MPC customers and has been denied return to MPC as a full-service, sales customer.

9. The District's position in its complaint and on summary judgment is based on a stipulation (commonly referred to as stipulation #2) approved by the PSC during MPC's natural gas utility restructuring (*PSC Docket No. D96.2.22*). The District argues that, because it presently uses less than 5,000 dkt gas per year, it qualifies for return to MPC as a full-service, sales customer under a provision within stipulation #2. *See, id., Order No. 5898d, Appendix 2, October 31, 1997*. Stipulation #2 establishes 5,000 dkt per year gas consumption as the threshold usage level to qualify for MPC transportation service and, in the District's view, establishes that customers falling below that threshold may return to MPC as full service sales customers.

10. The PSC may grant summary judgment when there are no genuine issues of material fact. Summary judgment, regardless of who requests it, may be granted in favor of the movant or in favor of the opposing party. The District has argued that there are no material facts in dispute. The PSC agrees and determines that the following "facts" are the material facts, are not in dispute, could not be disputed on any reasonable basis, and are sufficient to support a PSC ruling through summary judgment:

a. MPC was a party in PSC Docket No. D96.2.22, MPC's gas utility restructuring case. In that docket stipulation #2 was agreed to by certain parties, including MPC. In that docket stipulation #2 was approved by the PSC, through PSC Order No. 5898d, October 31, 1997. Stipulation #2 is part of an order of the PSC and is binding on MPC.

b. Stipulation #2 includes provisions allowing certain MPC gas customers who, at the time of the stipulation, were MPC full-service gas customers, to choose to be MPC gas transportation customers and obtain the commodity (i.e., the gas itself) from the competitive market. Stipulation #2 also includes a provision allowing a customer choosing transportation to return to MPC as a sales customer at the end of the customer's first year of transportation, but not thereafter.

c. The District, being able at the appropriate time to demonstrate that it qualified for gas transportation services by MPC, because it used 5,000 dkt or more natural gas annually, became an MPC gas transportation customer. At the time of becoming an MPC gas transportation customer the District signed a contract with MPC, a provision of which allows

return at the end of the first year of transportation, but precludes return to MPC as a full service customer after the end of the first year of transportation service.

d. The District did not request a return to MPC at the end of the first year of transportation service and has remained and presently is an MPC transportation customer. The District can demonstrate that it presently uses less than 5,000 dkt natural gas per year. The District has requested that MPC allow it to return to MPC as a full service customer under a provision within stipulation #2 which relates to customers using less than 5,000 dkt natural gas per year. MPC has denied the request.

11. Stipulation #2, in a section entitled "threshold level," establishes that customers with annual gas consumption exceeding 5,000 dkt have the opportunity to purchase gas from competitive suppliers and contract with MPC for distribution, transportation, and storage services. *See, PSC Order No. 5898d, Appendix 2, p. 3, para. 1.* Then, in a section entitled "provider of last resort," the stipulation establishes that at the end of the first year of obtaining supplies competitively the customers could return to MPC following proper notice, but after the end of the first year customers not exercising that return option could no longer return. *Id., p 5., para. 3.* The stipulation also includes a statement that "[c]ustomers using less than 5,000 [dkt] annually will also be allowed to return to sales service" under conditions that "will be addressed in later discussions on residential aggregation." *Id.* The District argues that, because it presently uses less than 5,000 dkt gas per year, it qualifies to return to MPC as a full-service, sales customer under this provision.

12. The PSC disagrees with the District's interpretation. The PSC determines that, in context of MPC gas restructuring and stipulation #2 in its entirety, customers who have once been designated "customers with annual consumption exceeding 5,000 dkt" (or the equivalent) for any purpose related to stipulation #2 must remain so designated for other purposes of that stipulation. There is no legal justification for a conclusion to the contrary (e.g., that customer rights under the stipulation might be governed by the particular annual-usage category the customer is in at the time a right is asserted). Stipulation #2 does not contemplate that there would be customers who might move above and below the 5,000 dkt per year usage threshold.

The stipulation clearly does not give MPC a right to require a customer falling below the 5,000 dkt threshold to return to full service. The stipulation does not give customers rights to require MPC to allow a return to full services at any time other than at the end of the first year of transportation. Once a customer has designated itself as being within a category, that category is fixed. Both the stipulation and the contract between the District and MPC provide that return must be at the end of the first year of transportation and cannot occur thereafter. The contract is in accord with the stipulation in this regard.

13. The stipulation #2 provider-of-last-resort provision pertaining to customers using less than 5,000 dkt gas per year is merely inserted as an assurance pertaining to an entirely different category of MPC gas customers, core aggregation or residential aggregation customers (an aspect of MPC restructuring which was, at the time of the stipulation not critical, but intended to be considered in the future, and eventually was in a PSC proceeding pertaining to MPC's gas pilot program, *PSC Docket No. D98.2.28*, a proceeding applying to supplier choice for customers having less than 5,000 dkt annual natural gas usage, and resulting in tariff provisions such as MPC's gas tariff provision AGTC-1, 18, on service agreements). The less-than-5000 dkt provision in stipulation #2 is not applicable in any way supporting the District's claim. There is nothing in the balance of the provider-of-last-resort provision or the context of the entire stipulation that pertains at all to choice in customers using less than 5000 dkt per year. The PSC determines that the less-than-5000-dkt return provision is not addressing the greater-than-5000-dkt customers that were able to shift to transportation and now want to return, for any reason, to full service.

14. The District argues that the PSC is simply removing the less-than-5,000-dkt clause from the stipulation, in violation of rules of construction that require effect be given to all words. The PSC disagrees. Effect is given to the clause. It is an assurance by the parties to the stipulation that something would eventually be done about customers having less than 5,000 dkt annual gas consumption. That is the only effect that is logical in context. The District argues that a prohibition on customers migrating between the over 5,000 dkt category for transportation services and the less than 5,000 dkt category for full services makes no sense and the District is

being penalized for testing the transportation market. The PSC disagrees. Although the system governing customer choice in gas supply could have been designed another way, it was not, and the commitments required under the existing system promote stability and predictability in regard to the utility operations. The District argues that it and others similarly situated have serious financial concerns regarding rises in energy prices and should be given the benefit of the doubt. The PSC might agree, if the answer to the question presented was in doubt, which it is not, or was a matter in which the PSC now has discretion, which it is not.

15. The District argues that the PSC must not lose sight of who is affected by the PSC's decision in this matter. MPC argues that, in any consideration of who is affected, the PSC should realize that small customers will be affected as they will see prices rise if MPC is required to allow the return of the District and others similarly situated to MPC as full services customers. Let there be no doubt about it, the PSC sincerely cares about who will be affected and how they will be affected by this order, as well as other orders of the PSC, but the question presented in this proceeding involves a legal conclusion, the proper answer to which is not discretionary or properly subject to any affect-driven result.

16. The District argues that no person has intervened in this proceeding and such should be viewed as an indication that potential intervenors support the District's position. MPC argues that such conclusion cannot be drawn. The PSC agrees with MPC. The absence of intervenors indicates nothing more than potential intervenors have chosen not to participate. The District argues that the PSC has committed blatant errors in its proposed order, the proposed order is misguided and markedly flawed, and the District feels compelled to bluntly challenge the proposed order, trusting the PSC's proposed order process allowing exceptions is not merely a superficial gesture. The District can rest assured that the PSC's proposed order and exceptions process is a meaningful exercise. The PSC has thoroughly considered the District's initial arguments and arguments on exceptions to the proposed order. The PSC sees no compelling reason resulting from arguments made by the District or resulting from the PSC's own reconsideration of the matter to change the results of the proposed order.

ORDER

For the reasons expressed above the PSC denies MPC's motion to dismiss. For the reasons expressed above, the PSC denies the District's motion for summary judgment and grants summary judgment in favor of MPC. The PSC hereby orders that the September 1, 2000, "petition for declaratory order" (complaint) by the Bozeman School District, *et al.*, against Montana Power Company is dismissed

Done and dated this 27th day of February, 2001, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

The original signed copy of this order is on file at the Commission's office.

GARY FELAND, Chairman

JAY STOVALL, Vice-Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

